CHEE CHIEW HEONG

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, IPOH
NH CHAN J
[CRIMINAL APPEAL NO. 33 OF 1978]
25 APRIL 1981

CRIMINAL PROCEDURE: *Dangerous Drugs Act 1952 - Sections 39B, 37(d), 37(da) - Possession - Trafficking - Cautioned statement - Presumption rebutted - Not considered by President - Retrial - No second chance for prosecution - Common law system.*

On 8 March 1977 the accused Chee Chiew Heong (f) was travelling in the night mail train from Butterworth to Kuala Lumpur. The mail train was searched by Customs Officers when it arrived at Ipoh. On board the train, in a coach with sleeping berths, the officers came upon the accused, who appeared to be sleeping. Next to her, close to her face, was a parcel which was later found to contain 1146.33 grammes of heroin and 81.03 grammes of morphine. She was charged for an offence under s. 39B of the Dangerous Drugs Act 1952.

On those facts, the learned President found that the accused was in possession of the parcel which contained the drugs, And also by virtue of s. 37(d) she would be deemed to be in possession of and to know of the existence of such drugs in the parcel until the contrary is proved. In view of s. 37(da) which provides that proof of possession of more than 100 grammes of heroin or morphine raises a rebuttable presumption that the possession is for the purpose of trafficking, the President called on the accused to make her defence. At the conclusion of the trial, the President convicted her of the offence of trafficking in the drugs contrary to s. 39B of the Dangerous Drugs Act 1952 without taking into account the cautioned statement of the accused which was put in evidence by the prosecution and so formed part of the prosecution's case and gave her the mandatory term of life imprisonment. The accused appealed.

Held:

[1] In this case, the presumption had been rebutted by the cautioned statement. A presumption can be rebutted from the evidence adduced by the prosecution;

[2] The defence ought not to have been called at the close of the prosecution's case. The presumption had been rebutted;

[3] All that had been proved by the prosecution at that stage was that she was in possession of a parcel. Because there was no longer any presumption there is therefore no evidence to show that the accused knew that the parcel contained heroin and morphine:

In the circumstances, the Court allowed the appeal, quashed the conviction and set aside the sentence.

Retrial

To order a retrial in the instant case would be to give the prosecution a second chance to make good the inadequacy of the prosecution's evidence. This defect the prosecution could very easily remedy by not putting in evidence the cautioned statement at the second trial.

It is, therefore, in the interest of justice as administered under the common law system of criminal procedure that the prosecution in the instant case should not be given another chance to cure this evidential deficiency in its case against the accused.

[Appeal allowed; conviction quashed and sentence set aside.]

Cases referred to:
Lim Yow Choon v. PP [1972] 1 MLJ 205
Soo Seng Huat v. PP [1968] 1 MLJ 80
Reid v. The Queen [1980] AC 343

Legislation referred to:
Dangerous Drugs Ordinance 1952, ss. 37(d), 39B

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Mohamed Shafee Abdullah, DPP

JUDGMENT

NH Chan J:

On the night of 8 March 1977, the mail train from Butterworth to Kuala Lumpur was searched by Customs officers when it arrived at Ipoh. On board the train, in a coach with sleeping berths, the officers came upon the accused, who appeared to be sleeping. Next to her, close to her face, was a parcel which was later found to contain 1146.33 grammes of heroin and 81.03 grammes of morphine.

On those facts, the learned President found that the accused Chee Chiew Heong was in possession of the drugs.

By s. 37(d) of the Dangerous Drugs Ordinance 1952:

> any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

Since the accused was found to be in possession of the parcel which contained the drugs, then by virtue of s. 37(d). she would be deemed to be in possession of and to know of the existence of such drugs until the contrary is proved. Section 37(da) provides that proof of possession of more than 100 grammes of heroin or morphine raises a rebuttable presumption that the possession is for the purpose of trafficking. As a result, the President called on the accused to make her defence. At the conclusion of the trial, she was convicted of the offence of trafficking in the drugs contrary to s. 39B of the Dangerous Drugs Ordinance 1952, and was given the mandatory term of life imprisonment.

It is most regrettable that the President ignored or did not take into account the cautioned statement of the accused which was put in evidence by the prosecution and so formed part of the prosecution's case (see *Lim Yow Choon v. PP* [1972] 1 MLJ 205). This is what she said in her cautioned statement:

> A friend of mine by the name of Leong Kim Swee came to my husband's house during the Chinese New Year and asked me when I was going back to Kuala Lumpur. I told him that I would be going back to Kuala Lumpur after the Chinese New Year. He told me that he would send something through me for his relatives in Kuala Lumpur. I asked him what are the goods and he told me, "dried prawns". At about 2.30 p.m. on 7 March 1977, he came to my husband's house at Jalan Telok Wan Jah and handed over to me this paper package said to contain dried prawns. I asked him where I should hand over this package.

He told me that his relative would be waiting at the railway station in Kuala Lumpur and he would take the package away from me. I then took the package from him and I felt the contents of the package. The contents felt like dried prawns. I did not open the package. I left Alor Setar by train to Kuala Lumpur at about 5 p.m. on 7 March 1977.

The presumption in s. 37(d) that possession of the container in which the dangerous drug is found is deemed to be possession of the drug itself is a rebuttable one. In this case, the presumption had been rebutted by the cautioned statement. A presumption can be rebutted from the evidence adduced by the prosecution; see *Soo Seng Huat v. PP* [1968] 1 MLJ 80 where Chang Min Tat J said:

(It) does not mean to say of course that (a) presumption be rebutted merely from the prosecution evidence. It can.

The defence ought not to have been called at the close of the prosecution's case. The presumption had been rebutted. All that had been proved by the prosecution at that stage was that she was in possession of a parcel. Because there was no longer any presumption there is therefore no evidence to show that the accused knew that the parcel contained heroin and morphine. In the circumstances, I would allow the appeal, quash the conviction and set aside the sentence.

The next question which I have to decide is whether or not I should order a retrial. Fortunately, I do not have to face the horns of this dilemma without the assistance of authority. In *Reid v. The Queen* [1980] AC 343, 348, Lord Diplock in delivering the advice of the Privy Council said:

The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the Judge in the conduct of the trial or his summing up to the jury. There are, of course, counter-vailing interests of justice which must also be taken into consideration. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the defendant. It is the prosecution's function, and not part of the functions of the Court, to decide what evidence to adduce and what facts to elicit from the witness it decides to call. In contrast the Judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between prosecution and defence during the course of the hearing and in his summing up to the jury. He is entitled, if he considers it appropriate, himself to put questions to the witness to clarify answers that they have given to Counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced Counsel it is generally prudent to leave them to conduct their respective cases in their own way.

It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the defendant, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the Judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the defendant to trial had failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case - and, if a second chance, why not a third? To do so would, in their

> Lordships' view, amount to an error of principle ... In the United States of America where new trials in criminal cases are a commonplace a similar distinction between cases in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence, and cases where the verdict has been set aside on other grounds, had been drawn by the Supreme Court of the United States. In the former class of case a new trial is not to be ordered in either the federal or the state jurisdictions: *Burks v. United States* [1978] 98 S.Ct. 2141 and *Greene v. Massey* [1978] 98 S.Ct. 2151.

To order a retrial in the instant case would be to give the prosecution a second chance to make good the inadequacy of the prosecution's evidence. This defect the prosecution could very easily remedy by not putting in evidence the cautioned statement at the second trial. It is, therefore in the interest of justice as administered under the common law system of criminal procedure that the prosecution in the instant case should not be given another chance to cure this evidential deficiency in its case against the accused.

I will not order a retrial.

Also found at [1981] CLJ 43